

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: :
PALMIERI, : Docket #20-cv-02663-
 : RA-BCM
 :
Plaintiff, :
 :
- against - :
 :
EAST COAST POWER & GAS, LLC, et al., : New York, New York
 : November 6, 2020
Defendants. :
 : TELEPHONE CONFERENCE
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PROCEEDINGS BEFORE
THE HONORABLE JUDGE BARBARA C. MOSES,
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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INDEXE X A M I N A T I O N S

<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Re- Direct</u>	<u>Re- Cross</u>
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None

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
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PROCEEDINGS

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THE CLERK: Good morning. Calling case number 20 civil 2663, Palmieri v. East Coast Power & Gas, LLC et al.

Counsel, will you please state your appearances for the record, beginning with the plaintiff?

MR. MICHAEL STEGER: Good morning. Michael Steger on behalf of plaintiff, Vincent Palmieri.

HONORABLE BARBARA C. MOSES (THE COURT): Good morning, Mr. Steger.

MR. TREVOR GOMBERG: Good morning, your Honor. On behalf of defendants, East Coast Power & Gas, LLC; Anthony Milanese, and John Knief, Levitt LLP, appearing by Trevor Gomberg. That's G-o-m-b-e-r-g, 129 Front Street, Mineola, New York. Good morning, your Honor.

THE COURT: Good morning, Mr. Gomberg.

So this is our first conference since the district judge referred the case to me for, among other things, discovery disputes. Before we get to the merits of the parties' current discovery disputes, I'd like to take the opportunity to address some broader issues with counsel.

So long as you are under my jurisdiction for discovery disputes, I will expect you, as I think all of my colleagues in the Southern District, will expect you to meet and confer in good faith and promptly before bringing a discovery dispute to the Court. I am a little unclear as

1 to whether that happened here or what did happen here, and
2 I will address this question to Mr. Gomberg, because in
3 your opening letter, your October the 26th letter, which
4 was addressed to Judge Abrams, you said in the first
5 paragraph that you were seeking judicial intervention
6 after, quote, "having engaged unsuccessfully in the meet-
7 and-confer process" with respect to the two issues you
8 brought to the Court's attention, number one, the
9 subpoenas; and, number two, the interrogatories. But in
10 your reply letter, dated November the 3rd, which was
11 addressed to me because the district judge had in the
12 interim referred the dispute to me, you state on page two,
13 quote, "rather than addressing these deficiencies in a
14 total discovery free-for-all, plaintiff in its opposition
15 seeks to backdoor party discovery issues for which there
16 has been no meet-and-confer. And then you go on to say
17 plaintiff's positions are unavailing, in any event. So
18 perhaps you could outline for me when the parties discussed
19 both the procedural and the substantive issues that are
20 dividing them at present and who called whom and when that
21 happened and what was discussed.

22
23 MR. GOMBERG: I'd be happy to do so, your Honor.
24 And I meant no inconsistency in my letters. Part of that is
25 I was trying to draft letters that were in compliance,

1 first, with Judge Abrams' individual rules and practices,
2 and then of course your Honor's individual practice rule
3 2(b), which is just slightly different. Judge Abrams' part
4 rules call for a representation that the parties have
5 engaged in the meet-and-confer process and that it was
6 unsuccessful.
7

8 THE COURT: Right.

9 MR. GOMBERG: And we did so. That meet-and-confer
10 conversation happened on October 15, 2020, during which,
11 among other items that are not directly pertinent to this
12 call but are related to discovery, the parties did discuss,
13 number one, the subpoenas and whether plaintiff would be
14 willing to narrow them; and, number two, interrogatory
15 responses. So that meet-and-confer did happen.

16 What was not discussed during the meet-and-confer
17 precipitating this application or Mr. Steger's response was
18 anything relating to party discovery -- the scope of party
19 document discovery, I should say. So that was not the
20 subject of a meet-and-confer; therefore, in our reply we
21 advised the Court that we felt that any discussion of those
22 party document discovery issues was premature.

23 THE COURT: Okay. So thank you for that
24 clarification. I now understood what you intended by each
25 of the passages that I read out to you. But I remain

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2 somewhat confused in the "let's get to the substance and
3 not worry too much about the mechanics" sense. I remain
4 somewhat confused because the plaintiff has certainly
5 convinced me, if nothing else, that the relevancy and
6 overbreadth issues, which are the primary basis for your
7 motion to quash the subpoenas, are also issues that were
8 squarely raised by the earlier and still pending party
9 discovery request, the Rule 34 document requests. So I
10 guess I'm scratching my head a little bit and asking myself
11 how is it possible that you had a conversation in which you
12 discussed whether a certain provision of the subpoena which
13 asked for a certain type of document was overbroad, but you
14 did not discuss whether essentially the same request made
15 earlier in a Rule 34 document demand was not -- defective
16 or not defective, as the case may be, in exactly the same
17 way. Did you really compartmentalize your discussion in
18 that manner?

19 MR. GOMBERG: We actually did, your Honor. And
20 here's why. In terms of discussing the subpoenas, first,
21 there was a short fuse on that with a return date of
22 November 6th. And so, therefore, we wanted to put in our
23 application to the court as soon as reasonably practicable,
24 after having conferred with counsel to give him an
25 opportunity either to withdraw those applications or to see

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2 if they could possibly be narrowed. This should perhaps be
3 looked at in a broader context. The parties have been
4 discussing a Protective Order that was only recently
5 entered. And, therefore, you know, we were trying to get
6 those in place because of the nature of documents to be
7 produced in the action. And so, given the posture of that,
8 the parties did in fact compartmentalize that. And a
9 meet-and-confer will be conducted on the discovery issues,
10 the prior discovery issues on Monday afternoon.

11 THE COURT: Would you agree with the counsel that
12 there is a significant degree of overlap substantively in
13 the categories of documents sought by the subpoenas and the
14 categories of documents sought by the Rule 34 document
15 demand?

16 MR. GOMBERG: Yes, I would agree there was
17 overlap, your Honor, to some extent; not exactly, because
18 it is seeking documents, you know, of course, that would
19 only be -- well, let me withdraw that and think about your
20 question as I respond. But I do believe that there is some
21 overlap. I wouldn't say they're identical, your Honor.

22 THE COURT: No, I'm not suggesting they're
23 identical. And I understand that the documents, which may
24 physically be in your accountant's files, your client's
25 accountant's files, may not be the same documents as are

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PROCEEDINGS

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physically in your client's own files at their office or place of business. But the issues in terms of what are the proper bounds of relevance here strike me as very similar, if not identical. I'm not suggesting identical.

All right, so now I have a question for Mr. Steger, also a sort of high-level question, so to speak, before we get to any individual issues. Mr. Steger, I know you agree with me that the subpoenas seek many of the same documents or at least documents going to the same kinds of information that you previously requested in your Rule 34 document demand as to which defendant has not yet produced documents, correct?

MR. STEGER: Michael Steger on behalf of the plaintiff. Yes, yes, your Honor.

THE COURT: In fact, I think it's fair to read into your opposition letter that that's one of the reasons you sent the subpoenas, because you were not getting satisfaction from the opposing party in response to your Rule 34 document requests?

MR. STEGER: That's correct, your Honor.

THE COURT: All right, looking at the timing of it, if I understand the timeline set forth in your letter, the responses to the document demands, the party document demands, were due and the objections were served in late

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2 August. August 24th I think is the date if I recall it
3 correctly from your letter. And instead of going at it
4 with opposing counsel in an effort to sort out what you
5 would and wouldn't get under Rule 34 and seeking the
6 assistance of the Court if you could not satisfactorily
7 come to a compromise there, you waited six weeks during
8 which you did not meet and confer substantively on the
9 document demand and sent out the subpoenas instead, thus
10 giving rise to your opponent's characterization of your
11 efforts as a back-door effort. Why did you do that
12 instead of addressing the issue in a more straightforward
13 manner in the context of your pending Rule 34 document
14 demand?

15 MR. STEGER: Well, there are a couple of reasons
16 for that, your Honor. We, as Mr. Gomberg said, we were
17 negotiating in good faith a Protective Order, and that did
18 take quite a while with really no fault on either side in
19 getting that to come in. I was also attempting to wait to
20 see what documents would be produced while the defendants
21 objected and said they would not produce certain types of
22 documents. My experience has been that frequently those
23 objections are made, and then responsive documents are
24 frequently produced, anyway. The defendants did produce
25 documents yesterday, quite a voluminous set that I have

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PROCEEDINGS

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not had time to review.

But we were also running into the -- I was running into deadlines with the discovery schedule to get things moving with any third parties. And the tax information that my client received for 2019 and 2018 included some dramatic changes in what he had received from the accountants, which led us to believe there was going to be relevant information that the accountants were going to have that the defendant was not going to produce.

THE COURT: All right, a couple of other things. A housekeeping matter. Under my individual practices, Judge Moses's individual practices, you are required to attach to your moving letter application or your responding letter application, as the case may be, copies of the discovery demands and responses in issue. I can't fault the moving party here for failing to do that in his moving letter because that was before the matter was referred to me, but it took a lot of nagging from chambers to actually ultimately get a copy of, for example, the interrogatories themselves and the supplemental responses, which just came in, I think, at about nine o'clock this morning after a couple of telephone calls to you, Mr. Steger, is that correct?

MR. STEGER: I submitted the copy of the

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PROCEEDINGS

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supplemental interrogatories late yesterday afternoon,
after we received a call from chambers.

THE COURT: Oh, all right. Okay. So I was right
about the nagging but wrong about the timing. I didn't see
them until nine o'clock this morning. Okay.

So for future reference, gentlemen, as long as you
are bringing your discovery disputes to Judge Moses, don't
make us nag you. I don't want to see every document demand,
I don't want to see every response if they're not all in
dispute; but the ones which are in dispute, I don't want to
just see how you characterize them in your letters. I
actually want to see the thing that you served or the
objections that you served, as the case may be. So please
make a note for the future.

Now, one other technical matter -- and I don't
mean technical in a dismissive sense in this sense; I
think it is potentially a significant problem here for
defendants. How is it that East Coast Power & Gas had
standing to move to quash subpoenas served on non-parties?
The rule in the Second Circuit -- and not just in the
Second Circuit -- but certainly in the Second Circuit is
that ordinarily a party does not have standing to move to
quash or limit a non-party subpoena unless the moving party
claims, and I quote, "some personal right or privilege,"

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PROCEEDINGS

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close quote, regarding the documents. This is an issue that the Second Circuit has written on very recently in *Trump against Vance*, 941 F.2d 631; 642, note 15. In that case it was held that President Trump did have a personal right or privilege with regard to a subpoena served on his accountant, namely a Presidential privilege that we all read about in the newspaper that he claimed -- and it's still litigating. Judge Moses wrote about the same point a couple of years ago in *Ortiz against Mount Sinai*, 169 F. Supp. 3rd, 538 at 544 to 45. That is from the Southern District, of course, in 2016. So with the exception of the quasi-privilege applicable to the tax returns, which I would put in your column, Mr. Gomberg, as a personal right or privilege, what gives your client standing otherwise to object to the subpoenas at issue here?

MR. GOMBERG: Well, I'm glad your Honor asked the question. And we were going to include that as part of our presentation today. Of course there's a personal right or privilege. We were looking at a different case, although I think your Honor's cases are more recent. We were looking at a case by Judge Francis, *Allison v. Claus*, F.2, 2015, Westlaw 136102, standing for the exact same proposition. But in terms of your Honor's question, the personal right or privilege is that the documents in the

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PROCEEDINGS

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possession of the accountants are effectively documents of East Coast. Documents are prepared on East Coast's behalf, financial statements in which the accountants have input. That goes to request number one.

Your Honor mentioned request number two, which is the tax returns. Documents pertinent to East Coast's gross revenues -- this is request number three -- compensation for East Coast's -- defendant East Coast's principals, who are co-defendants Milanese and Knief, capital contributions, capital withdrawals and loans made by or to those principals. And those are requests four through nine, your Honor -- four through ten, actually. And then documents concerning other compensation matters and communications with East Coast. So we're talking every one of Mr. Steger's 12 demands, your Honor, and the two substantively identical subpoenas do go to personal rights of East Coast and/or its principals, the co-defendants -- I should say its other principals.

THE COURT: Counsel, I completely disagree with you. I think you are misunderstanding the distinction drawn in those cases. A personal right or privilege has to do with the nature of the objection being made, not your theoretical relationship to the documents. And when I look at the nature of the objections being raised to the

subpoena -- and I'm looking now at your moving letter dated October the 26th -- with the exception of the tax documents, which, as I said, I think you have adequately raised a personal right or privilege with respect to the tax documents, adequately raised for standing purposes -- but as to every other objection that you have made to every other category, it's relevance, relevance, relevance, relevance, relevance. And the general rule is a party does not have standing to object to a non-party subpoena on that ground because that round does not raise a personal right or privilege.

Now, I grant you that the documents are, in some sense, yours. And not just in some sense but in a Rule 34 sense, by which I mean that if the question were put to me squarely -- and perhaps it will be in short order -- I would likely hold, because I have so held in the past, that documents in the physical files of a party's accountant are deemed to be within the control, i.e., within the, quote, "possession, custody or control," which is the language in Rule 34, are deemed to be within the control of the party itself for Rule 34 purposes.

So typically, what would happen in a case like this is that the plaintiff would send the Rule 34 document request to the defendant, the parties would argue about

1 the appropriate bounds of relevance. If they couldn't
2 agree on it, they would bring the dispute to me. And once
3 those matters were resolved, I would expect the defendant
4 to produce documents that were responsive to the
5 appropriate requests, not only from their own physical
6 files but also, if necessary, to procure them from the
7 files of its accountant over which the defendant exercised
8 control. That's what would happen in a normal case.

10 A number of shortcuts were attempted in this
11 case on both sides. The plaintiff attempted a shortcut by
12 sending a short-fuse subpoena directly to the accountant,
13 and the defendant attempted a shortcut by moving to quash,
14 as to which it doesn't as a technical matter for the most
15 part have standing. So I think we've kind of all started
16 off on the wrong foot here, gentlemen.

17 Let's look practically here down the road. What
18 are the parties' real needs for getting this sorted out in
19 time to get depositions done in time to timely complete
20 discovery? Plaintiff, let me hear from you first.

21 MR. STEGER: Well, your Honor, that's a good
22 question. And I don't -- Mr. Gomberg and I had a lengthy
23 discussion yesterday about some of the issues before you
24 but also other discovery issues. And we are trying to
25 figure out what a reasonable schedule is going to be to

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PROCEEDINGS

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complete this written discovery here. You know, we are, obviously, a bit behind schedule. There has been some documents produced by the defendant. Plaintiff anticipates producing documents on Monday. As far as some of these document requests, you know, we both thought -- and if I'm speaking out of turn, I'm sure Mr. Gomberg will correct me -- that, you know, some of the issues to a degree can be sorted out regarding the party discovery without further intervention of the Court, although there may be some need for further discussions down the road.

THE COURT: Your discovery cutoff is December something, right?

MR. STEGER: December 21st is the fact discovery cutoff. I think Mr. Gomberg was going to mention it. I'm sorry, I'm getting a little off track from your direct question, your Honor, but I believe Mr. Gomberg has an arbitration coming up in December, and there's also a pending Motion to Dismiss before Judge --

THE COURT: Yes, look, I can extend that deadline for you.

MR. GOMBERG: Very much appreciated, your Honor.

THE COURT: And maybe we need to start there and then start putting discovery on a little more of a rational track that will perhaps encourage the parties to actually

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PROCEEDINGS

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work as much of this out as they can between themselves.

How many depositions are there going to be, roughly? I'm not going to hold you to this; I'm just -- for planning purposes.

MR. STEGER: On the plaintiff's side, I'd say five, probably five.

THE COURT: That's a lot. Who are they going to be, the individually-named defendants? Are you going to do a Rule 30(b)(6) of the LLC?

MR. STEGER: Well, probably the CFO, who may be -- you know, and the 30(b)(6) may be one or, you know, one or more of the members or the CFO. And then --

THE COURT: And then are you going to want to take any third-party or non-party depositions?

MR. STEGER: Depending on what documents we get, you know, we may want to depose one or more of the accountants.

THE COURT: Okay, and defendant, what are you thinking of in terms of depositions?

MR. GOMBERG: Thank you, your Honor. You would probably be thinking the same, although it looks a little different for us. Of course, you have the plaintiffs; but then there -- look, I mean, our theory of the case, although issue isn't joined -- and that's part of the

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PROCEEDINGS

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complexity here, your Honor, in light of the Rule 12 motion, which goes to jurisdictional grounds, but --

THE COURT: Well, look, but the Rule 12 motion, which goes to jurisdictional grounds, also seems to have found its way substantially into the parties' current discovery dispute -- and just to preview those issues a little bit for you, just as I feel that both sides here have attempted an inappropriate shortcut in their discovery strategies, it seems to me that both sides are playing games with the issue of whether the plaintiff is or is not a member of the defendant LLC.

Not to put too fine a point on it, but both sides are trying to have it both ways. The plaintiff has clearly pleaded, at least in his amended Complaint, that he is no longer a member of the LLC because the defendants expelled him from the LLC and effectively took back his membership interest, and he wants to be paid for that according to the terms of the parties' contract. And there's a dispute over whether he gets paid a little bit of money or a lot of money, which in turn depends on whether he was fired and expelled for cause or without cause. But the answer cannot be that he has no interest in the LLC and also doesn't get paid for it.

As a sort of argument point, alternative, the

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PROCEEDINGS

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plaintiff is saying to me, well, and if I am still a member of the LLC, then one of the things that I get, one of the sticks in the bundle of rights that constitutes being a member of the LLC, is I get inspection rights. So I would get to see all of these documents, anyway. And that's what the defendant calls trying to have it both ways.

But the defendant is also trying to have it both ways because the defendant appears to be taking the position, is taking the position in his jurisdictional Motion to Dismiss that the plaintiff is still a member of the LLC and therefore that there isn't complete diversity, and the case has to be sent off to state court. And yet, the defendant won't let him see any LLC documents.

So, you know, guys --

MR. GOMBERG: Your Honor, may I be heard on that point?

THE COURT: -- this isn't a game of After You, Alphonse; this isn't a game of semantics. And I would just add to the analysis that a Motion to Dismiss on jurisdictional grounds is not confined, as the parties have acknowledged, I think, in their 12(b)(6) motion papers, which is not directly before me but I took a look at them, as the parties have acknowledged -- and this is not difficult to acknowledge because it's well-settled law --

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PROCEEDINGS

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that motions to dismiss on jurisdictional grounds are not confined to the face of the pleadings, that fact can come in. And so we could in fact term all of this discovery as not just going to the merits but to some extent actually going to the jurisdictional point. It is going to be of interest jurisdictionally what the LLC's papers say about whether the plaintiff is or is not a member.

Now you may tell me what you wanted to tell me.

MR. GOMBERG: Thank you, your Honor. We looked at this a little differently than perhaps your Honor had framed it on the jurisdictional point. In plaintiff's initial pleading he did in fact make -- and your Honor can cut me off at any time because I know your Honor didn't intend to hold a motion conference today on the Motion to Dismiss -- but plaintiff did initially plead that he was still a member and that he had a membership interest. Some of those references did remain in the First Amended Complaint.

THE COURT: Sort of.

MR. GOMBERG: These are verified --

THE COURT: Sort of.

MR. GOMBERG: -- pleadings. Yeah. These are --

THE COURT: Sort of. Sort of.

MR. GOMBERG: -- verified pleadings, your Honor.

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PROCEEDINGS

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I understand, your Honor. I understand, your Honor. And, of course, some of those attempts to remove some of those references were, of course, in response to our initial Motion to Dismiss.

The other thing is, a more pragmatic point, your Honor, is that, you know, there has to be a mechanism for the tendering of the interest for redemption. And that hasn't happened here. You can continue to have, you know, certain -- some rights in the LLC as a member or to maintain your membership interest while losing some rights. I framed it incorrectly, your Honor. And we've cited some case law on that point. So we just look at that as slightly different. But your Honor's points are well received.

I just want to also just tweak one item, if I may, just before we get too far afield of it that was discussed between your Honor and Mr. Steger earlier is that in terms of who produced what or when or why the -- what was the reason for serving the non-party subpoenas -- your Honor had stated not getting satisfactory discovery from the opposing party. Just to put things slightly in context, Mr. Steger mentioned we're going to get defendants' initial production on Monday. So there was coordination --

1 PROCEEDINGS 22

2 THE COURT: I understand.

3 MR. GOMBERG: -- between the parties.

4 THE COURT: I understand.

5 MR. GOMBERG: Okay. Thank you, your Honor. I don't
6 want to belabor that.

7 THE COURT: I understand.

8 MR. GOMBERG: Okay.

9 THE COURT: I understand that. And the motion is
10 not within the scope of my reference because it is a
11 dispositive motion, the Motion to Dismiss, whether it's
12 jurisdictional or whether it's a 12(b)(c). And my Order of
13 Reference is what we call a general pretrial reference,
14 which includes scheduling, discovery and other
15 nondispositive pretrial matters but does not include the
16 pending Motion to Dismiss. So I'm not going to be deciding
17 that. But, of course, in shaping what the appropriate
18 bounds of discovery are, I am entitled to, and I do feel
19 obligated to understand what the issues are that are
20 pending before the district judge and, if necessary, to
21 handicap how I think that's going to come out. I will not
22 hesitate to do that.

23 Now, let's get to our practical issues. It sounds
24 like --

25 MR. STEGER: Your Honor --

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PROCEEDINGS

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THE COURT: Yes.

MR. STEGER: -- Michael Steger for the plaintiff, if I may just be heard briefly? I'm going to proceed under the assumption that you don't really want to hear about the Motion to Dismiss, but one issue that I think relates to what we may be discussing momentarily regarding the tax returns, it's undisputed by both parties that Mr. Palmieri was a member of the defendant LLC at least through February 25th of this year. So from our perspective, we don't see what the privilege would be for tax returns for years where he was a member of the LLC.

THE COURT: I understand that point. Thank you.

MR. STEGER: Okay.

THE COURT: Now, so it sounds like both parties are amenable to an extension of the discovery schedule here so that the document issues can be worked out without anyone feeling that there's a gun to their head. And it also sounds like both sides want to get through document discovery or perhaps through what we sometimes call substantial completion of document discovery before taking depositions. Is that true, Mr. Steger, on your part?

MR. STEGER: Yes. It's Steger, your Honor.

THE COURT: I'm sorry, Steger.

MR. STEGER: Yes.

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PROCEEDINGS

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THE COURT: And, Mr. Gomberg, you want to do it in that order, as well?

MR. GOMBERG: I concur, your Honor.

THE COURT: All right. So, look, I'm going to give the two of you an opportunity to do it right, that is, to work out as much of this as you possibly can by yourselves.

Let me look at the calendar and figure out, to begin with, how much time we're going to need for all of this. If I extend the discovery schedule by a period of thirty days, that might not be time enough, particularly given that there are a bunch of holidays coming up and that the worsening COVID-19 situation is not helping very much. So let me pull my calendar up on the --

MR. GOMBERG: Your Honor, may I add a wrinkle to this?

THE COURT: Sure.

MR. GOMBERG: Sorry. This is Mr. Gomberg speaking. Forgive me, your Honor. And we have a -- Mr. Steger mentioned that there's a -- defendants' firm has a large commercial arbitration covering much of December. But that's number one. Number two is that, given the pendency of the Rule 12 motion, your Honor, that is adding some complexity to the schedule because we don't have the scope of the pleadings defined. We do anticipate serving

1 PROCEEDINGS 25

2 counterclaims, but until we know the contours of the
3 pleadings, that's going to impact discovery, as well, and
4 depositions, you know, party depositions. So I just raise
5 that as a kind of complicating factor. I think we are all
6 just -- we're on the same page, Mr. Steger and I, in terms
7 of looking for what's a reliable, you know, time table for
8 discovery. It's just that's a complicating factor.

9 THE COURT: I understand.

10 MR. STEGER: Yes, oh --

11 THE COURT: Luckily --

12 MR. STEGER: Your Honor, Just to --

13 THE COURT: Luckily --

14 MR. STEGER: I'm sorry.

15 THE COURT: Luckily -- thank you, gentlemen -- I
16 did not hear counsel ask me to stay discovery pending the
17 outcome of the Motion to Dismiss, because I would have
18 denied that application. I understand there is a
19 possibility, I think a slim one, that the case will be
20 dismissed on jurisdictional grounds, but that only means
21 that the same issues will be joined in another forum. So
22 the discovery would not be wasted.

23 I understand there is a possibility that the
24 individual defendants will be dismissed out for
25 insufficient pleading, but in the event that happens, there

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2 will likely be need to amend granted. And, in any event,
3 the discovery required with respect to the contract claims
4 against the LLC will overlap substantially with the
5 discovery that would be required or requested in the event
6 that the individual defendants are held in as defendants.

7 So we are going to go ahead with discovery. If the
8 pleadings expand at a later date, if counterclaims are
9 served, for example, then discovery may need to expand at
10 that point, as well. But at present, we can go ahead and we
11 will go ahead with discovery bounded by the claims as
12 asserted in the present, I guess it's the Amended
13 Complaint.

14 Now, with that as backdrop, what I'm going to try
15 to do today is give you a new discovery schedule,
16 understanding it's not set in stone and if you get a late
17 decision from the district judge on the Rule 12 motions,
18 and if counterclaims are filed, you know, past the end of
19 what I'm now seeing as an appropriate discovery schedule,
20 well, you know, we can open it up again and do more
21 discovery if we have to. But I think we need to get
22 started here.

23 So I am thinking, you know, because we have to
24 start somewhere, I am thinking of extending your fact
25 discovery deadline out for about two months to the end of

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PROCEEDINGS

27

February and working backwards from that in terms of how you're going to resolve the pending document discovery issues. On the scheduling point, any response, plaintiff?

MR. STEGER: No, your Honor. Perhaps -- no, I think maybe, like, the last Friday in February may --

THE COURT: Exactly, February 26th, that's a Friday, right.

Defendants?

MR. GOMBERG: Your Honor, I do believe that's still -- it's much appreciated, your Honor -- I believe it's still aggressive; but, of course, we'll take all the time that your Honor's willing to give. You know, we see what exists now is an unworkable schedule, your Honor.

THE COURT: All right, so I'm going to go ahead and give you a new fact discovery deadline of February the 26th, and I'll adjust the -- I'll give you a written order adjusting the interim deadlines before and after that, more or less proportionately.

Now, in terms of the parties' current document disputes, my view is that they're not properly teed up and that the parties have inadequately met and conferred. What I would like to see you gentlemen do is address these issues holistically, and by "holistically," I mean address them substantively without paying a whole lot of attention

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PROCEEDINGS

28

to whether you are disputing a Rule 45 subpoena or disputing a Rule 34 document request. And do the best you can on a substantive basis in terms of what the plaintiff needs and what the defendant will be willing to produce either from its own files or from the files of its accountants, which as I mentioned are, as a legal matter, within the defendants' possession, custody and control; and give you a deadline within which to come back to me with any issues you cannot resolve, any substantive issues that you cannot resolve. That is what makes sense to me because it makes you do more work and it makes me do less work.

Mr. Gomberg -- let's take it in the other order now -- does that work for you?

MR. GOMBERG: Your Honor, it does work for defendants.

THE COURT: And the plaintiff?

MR. STEGER: Yes, your Honor.

THE COURT: All right, so what I will do is I will -- let's see, what's the position of the actual accounting firm? So have you been in touch with them, Mr. Gomberg?

MR. GOMBERG: Your Honor, I have. We represent one of them, and --

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PROCEEDINGS

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THE COURT: Which one do you represent?

MR. GOMBERG: Of course, forgive me, your Honor; I should have been clearer. We represent AVM DeMoors, and AVM DeMoors did serve an objection to the subpoena. The Bottadio Group, which is the second accounting firm -- their legal name is actually Bottadio and Co. LLP -- they served their own objection, your Honor.

THE COURT: And they have their own counsel?

MR. GOMBERG: They do, your Honor.

THE COURT: All right, and I take it neither of them is planning to actually produce documents today?

MR. GOMBERG: That's correct, your Honor.

THE COURT: Okay. So what I'll do is -- I guess the easiest way as a technical matter to do it is I will grant the defendants' motion to quash to the extend of extending the response date to the subpoenas until such time as the Court has held its next conference, at which time I will rule substantively on any issues, whether under Rule 34 or under Rule 45, that the parties cannot resolve amongst themselves.

Now let's get a schedule for when that is going to happen. It seems to me that a couple of weeks should be time enough for the two of you to thrash through these document issues. Yes?

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PROCEEDINGS

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MR. STEGER: Yes, your Honor, from the plaintiff's side.

MR. GOMBERG: And, your Honor, from the defendants' side, I agree with you on the meet-and-confer front. That should be enough time. As I mentioned, we're looking to speak, Mr. Steger and I, on Monday. I only raise again, just for housekeeping purposes -- and it's a high level -- that we do have a large commercial arbitration in December that a significant amount of my time is being devoted to. So I'm not sure that the production issues will necessarily be resolved, you know, in very short order, even though Mr. Steger and I have been working, I think, pretty collaboratively, although I'm only speaking for myself.

THE COURT: Well, Mr. Gomberg, are you the only lawyer at your firm who's working on this matter?

MR. GOMBERG: I'm primarily responsible for the matter, your Honor.

THE COURT: Because I don't think I can just -- I don't think I can just give you a month off from discovery; that's not workable here.

I can certainly bring you back -- when does your arbitration start?

MR. GOMBERG: It starts December 7th, your Honor.

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PROCEEDINGS

31

THE COURT: Well, I'm certainly planning on bringing you back and giving you an order with respect to any unresolved document production issues before that. But when I do give you that order, assuming that the parties can't work everything out themselves, when I do give you that order and say, you know, you have to produce this, you don't have to produce that, you have to produce these but only within a certain period of time, whatever the order ends up being, you know, I am going to expect that production to take place or at least to begin promptly. And I'm not going to want everyone to not do any work on it for a month because you are tied up in another matter. Now, can you arrange within your firm to make sure that someone is backing you up for discovery purposes in this case while you are otherwise engaged?

MR. GOMBERG: I can, your Honor. I can. And just so -- I think I might have been unclear, so forgive me, your Honor, but I do think that Mr. Steger and I should be able to work out as many of the discovery issues as we can, at least have a plan for that production, to hopefully minimize the need for court intervention on that.

THE COURT: All right, so today is the 6th, and I normally don't actually hear discovery disputes on Fridays. For some reason that I cannot now recall, I made

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PROCEEDINGS

32

an exception for this one. What I'd like to do is bring you back on Thursday, the 19th. Mr. Salim, what does our calendar look like on Thursday, the 19th?

THE CLERK: Your Honor, we have an opening at 11 a.m. We have a 10 a.m. scheduled and a 2:15, but 11 is open now.

THE COURT: All right, so gentlemen, we are going to have a discovery conference on the 19th of November at 11 o'clock in the morning by telephone, just as we have conducted this one. And in advance of that conference, which will be a discovery conference to deal with both the accounting subpoenas and the Rule 34 document request, because I don't really want to stand on ceremony as to what rule we're going to do here. In advance of that conference on the 19th I would like a joint letter from the parties. I'd like it by Monday, the 16th. And in that joint letter I would like the part -- which shall be filed on ECF -- I would like the parties to tell me what disputes remain and to briefly, because I don't think any of this is rocket science, to briefly outline for me with respect to the remaining disputes the parties' respective positions. And I will give you an opportunity to elaborate on the parties' respective positions during the conference on the 19th. Now, can you get that done by the 16th, or do we need to

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PROCEEDINGS

33

look at Thanksgiving week, which I'm kind of trying to avoid?

MR. STEGER: Mr. Gomberg, I would defer to you. That seems very aggressive, given the number of document requests at issue.

MR. GOMBERG: It does. Certainly, I mean, if the -- well, I want to work within whatever time frame works for the Court. If we could get a few more days on that, it might -- I agree with Mr. Steger, and if the Court is amenable, have a few more days to try to resolve those issues.

THE COURT: Well, if we can't make it work for a conference on the 19th, because I do need your joint letter a couple of days in advance so that I have time to consider what the remaining issues are, if we can't make a date to resolve it on the 19th, Mr. Salim, what does Tuesday, the 24th, look like?

THE CLERK: Tuesday is open.

THE COURT: I could see you on Tuesday, the 24th, in which case I would need your joint letter by Thursday, the 19th. That gives you almost two weeks to get that joint letter in.

MR. STEGER: From the plaintiff's side, that would be very helpful, your Honor. And I think that's workable.

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PROCEEDINGS

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THE COURT: Mr. Gomberg?

MR. GOMBERG: Yes. Thank you, your Honor.

THE COURT: Okay. Fine. So promptly meet and confer. Joint letter by the 19th, please, telling me what you have been unable to resolve and briefly, succinctly, outlining your respective positions with respect to the disputes. I will see you -- let's make it 10 a.m. on the 24th, which is a Tuesday. Same time, same place; in other words -- and by place, I mean same telephone (indiscernible) as today.

And just for a housekeeping matter, since you represent one of the accounting firms, you should probably indicate in your letter that, to the extent you are objecting to one or more categories of the subpoena, it is the accounting firm which is making the objection.

MR. GOMBERG: Thank you, your Honor.

THE COURT: And the accounting firm that you don't represent, you might want to get in touch with them and have them send in a me-too letter or some such thing because I don't want anyone to end up being -- having their rights not protected by the fact that they have an unresolved standing issue. In other words, I don't want that to be the issue. I want to get to the substance.

All right? So meet and confer promptly. Joint

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PROCEEDINGS

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letter to me by the 19th. Anything that you can't work out yourselves, we will resolve by the 24th. And my request to both sides, particularly with respect to this issue of is he or is he not a member of the LLC, he's going to be entitled to discovery on that point regardless of the parties' respective positions, whether they agree, whether they disagree, whether they're willing to say what their position is. The plaintiff's position now is I was a member, now I'm not anymore because they kicked me out. The defendant is studiously refusing to take a position, I think, on whether he is or isn't a member. Maybe I'm mistaken about that. Mr. Gomberg, is the defendant taking a position?

MR. GOMBERG: Your Honor, we have taken a position that he remains a member of the LLC. And they're --

THE COURT: So your position is that you sent him a letter expelling him and yet you don't have to pay him any money because he's still a member?

MR. GOMBERG: That's correct, your Honor, because there's a distinction here that I want to make sure that I'm being clear about, which we tried to do in our papers. The expulsion, your Honor, is not a termination of that or extinguishment of that membership interest. The expulsion --

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PROCEEDINGS

36

THE COURT: Well, what is it, then?

MR. GOMBERG: Well, your Honor, that requires a tendering of --

THE COURT: What does it mean?

MR. GOMBERG: -- the member -- well, your Honor --

THE COURT: No, no, tell me what it means. It was your word, your letter, your clients' letter. What does it mean to expel a member of the LLC if he still has an ownership interest, a membership interest?

MR. GOMBERG: Well, he still has a membership interest, your Honor; that's exactly right. And your Honor --

THE COURT: What does -- let me put it another way -- what does he not have anymore now that he's been expelled?

MR. GOMBERG: Well, your Honor, he no longer has management rights as a non-managing member of the company; he's --

THE COURT: He never had managing rights; he was a minority member and employee --

MR. GOMBERG: But he was the CEO, your Honor.

THE COURT: Yes, but that was an employment relationship. He didn't have management rights by virtue of his membership interest; he had management rights by virtue

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PROCEEDINGS

37

of his contract and his employment. So what does he still have that makes him a, quote, "member," close quote?

MR. GOMBERG: He still has as ten percent interest, your Honor, in the LLC, until such time as he is -- and this is a mechanism that is under the operating agreement. And until such time as he has, you know, has tendered that membership interest for redemption, he has -- and there's a mechanism for that -- that he retains that membership interest, your Honor.

THE COURT: What does that mean? Does that mean anything other than a book entry? Does it come with any rights or any economic advantages?

MR. GOMBERG: I don't know what would be termed as an economic advantage. I would think that a membership interest would be an economic advantage and that -- for the plaintiff. I'm trying to answer your Honor's question as best I can. It's complicated to explain the mechanism under the operating agreement because there are complicating factors, such as the circumstances under which the termination of the employment relationship has occurred. So there is actually an interweaving of those two things, your Honor.

But what hasn't happened here is there hasn't been a tendering of the membership interest, and there hasn't

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PROCEEDINGS

38

been -- the redemption mechanism hasn't been followed here.
He remains a member until such time as that has happened.
And because he remains a member, it's our position that
that's what has given rise to the jurisdictional issue.

THE COURT: And if he were to, quote, "tender his
membership for redemption" tomorrow, you would then owe him
money, correct, either --

MR. GOMBERG: Not nec --

THE COURT: -- a small amount of -- either a small
amount of money if you're right that he was terminated for
cause, he would get his \$200,000 back, or a larger amount
of money if he were to succeed in convincing the Court that
he was terminated without cause.

MR. GOMBERG: Actually, I wouldn't put it in
either of those buckets, your Honor.

THE COURT: Because?

MR. GOMBERG: I don't want to divulge too much of
the case theory. I would be happy to explain *in camera*, if
your Honor would like to hear that further, but I would say
that neither of those are the case, your Honor.

THE COURT: Well, I think you would say that
neither of those is the case because you have another
theory, a theory which will be articulated in your
forthcoming counterclaims under which the plaintiff did

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PROCEEDINGS

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very bad things and consequently owes the LLC a lot of money, perhaps on breach-of-contract theories, perhaps on tort theories -- I don't know the details yet. So you have some sort of offset theory, am I close?

MR. GOMBERG: That is certainly close, your Honor.

THE COURT: Okay. I'm not sure that would do it for you because, on the one hand, there would be a clear contractual redemption payment right, and on the other hand there would be an unproven counterclaim, the merits of which could take some time to sort out, and I'm not at all sure that Judge Abrams would say you get to hold the redemption money while you try to prove whatever your counterclaims are. But that will be her call, not mine.

MR. GOMBERG: Right. And I just want to make sure that I'm being clear, because we don't think that, as your Honor has framed an offset theory, we don't think that's solely based on what we'd be pleading in our counterclaim. We think there are contractual bases for such a position.

THE COURT: All right. Look, as I said, the Rule 12 motion is not before me; it's before the district judge. And I don't know on what schedule she's going to get to it. But certainly for discovery purposes, I'm not sure it makes a difference to the scope of discovery whether your expulsion of the plaintiff did or did not

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PROCEEDINGS

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succeed in divesting him of his, quote, "membership interests," close quote. That is not what the scope of discovery is going to depend on here. So I think you should both keep that in mind.

MR. GOMBERG: Thank you, your Honor.

May defendant be heard on one other item?

THE COURT: Go ahead.

MR. GOMBERG: Okay. And if your Honor does not want to hear this at this time, that's fine. But there was an issue of interrogatory responses that was put before the Court. There were some supplemental interrogatory responses served by plaintiff. And I'm particularly talking now -- there were two interrogatories at issue, but I'll just raise the first that we think is more important here, which is the password for a cell phone that was turned in by plaintiff. We're talking a couple of months ago, your Honor, and now we're --

THE COURT: Okay.

MR. GOMBERG: -- being told -- yes, sorry, your Honor.

THE COURT: All right, so, counsel, first of all, thank you for bringing that to my attention. I appreciate that. This aspect of the parties' current dispute I think has been properly teed up because it is party discovery,

1 and it was -- the defendant properly engaged my
2 jurisdiction on the point in your opening letter. So the
3 state of play at the moment, as I understand it, is that
4 the plaintiff has served supplemental responses to
5 interrogatories numbers one and three, which are at issue,
6 and interrogatory number one, which does, in my view, fall
7 within the scope of Local Civil Rule 33.3. He has
8 identified one person to whom he gave a discount and has
9 been a little vague about whether he gave a discount to
10 anybody else.

12 So, Mr. Steger, you are required to answer that
13 interrogatory fully under Local Civil Rule 33.3. It is not
14 good enough to say maybe there were others unless what you
15 mean to say is that the plaintiff is unable to answer the
16 question more precisely because for some reason he doesn't
17 know or can't remember or can't put his hands on the
18 records. Which is it?

19 MR. STEGER: Well, your Honor, he -- as set out in
20 the objections, there are documents in the defendants'
21 possession that show who was granted discounted or zero
22 rates. The only specific person Mr. Palmieri can recall
23 that he granted that rate to is his mother. The purpose of
24 the response was he's not saying that is conclusively
25 everyone that he granted a discounted rate to; there may be

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PROCEEDINGS

42

others, but he was not trying to mislead the defendants.

THE COURT: So he's not saying there are others, but I don't have to tell you who they are?

MR. GOMBERG: Correct.

THE COURT: He's saying there are others, but I can't remember who they are; is that what you're telling me?

MR. STEGER: No. He's saying there may be others, but he does not recall them, but it's a situation where his recollection could potentially be refreshed, but he does not have documents that would refresh his recollection.

THE COURT: All right, so he doesn't remember and does not have in his possession the documents from which he could ascertain an answer to that question beyond his mother; is that what you're saying?

MR. STEGER: Yes, your Honor.

THE COURT: All right, so you're going to need to supplement that interrogatory answer to make it clear that the failure to list any other names is not due to a refusal, not, in other words, on the basis of your objection, but on the basis of inability given the state of your client's current memory and access to documents. All right?

MR. STEGER: Okay. Thank you.

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PROCEEDINGS

43

THE COURT: With respect to interrogatory number three, which asked for the passcodes to the iPhone, let me just make sure I understand what's happening here. Was this an iPhone that was issued by the defendant LLC to the plaintiff for work purposes?

MR. GOMBERG: It was, your Honor.

THE COURT: And it was turned in by the plaintiff when his employment was terminated?

MR. GOMBERG: It was this year, your Honor.

THE COURT: And how is it that if the phone was issued to the plaintiff by the defendant LLC that someone at the LLC doesn't have some kind of administrator rights that would allow the LLC to unlock that phone?

MR. GOMBERG: Your Honor, I wish that were the case. The problem with access to cell -- and this is very cutting edge, and it's in the news. This is the problem that even the FBI was unable to access the shooter in San Bernardino, California, last year, your Honor --

THE COURT: Except ultimately they were. They turned to some kind of fancy Israeli tech firm, and they cracked that iPhone.

MR. GOMBERG: Well, that's right, your Honor. We're hoping to not have to resort to a fancy Israeli tech firm here. But we're talking about a cell phone that was

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PROCEEDINGS

44

turned in months ago. It's not like we're asking Mr. Palmieri what was the cellphone code to the phone you had in college. The whole point of a phone password, your Honor, is it's something you can recall. And when the interrogatory response says, you know, I don't recall, and I mean --

THE COURT: Okay. Okay. Okay, Mr. Gomberg --

MR. GOMBERG: -- you could give an option, you could give --

THE COURT: -- Mr. Gomberg, you don't need to belabor the point and --

MR. GOMBERG: Of course, your Honor.

THE COURT: -- the beeping that occurred was almost certainly my 11 o'clock conference trying to get themselves started. So, Mr. Steger, I have to agree with Mr. Gomberg that it's just not plausible in this day and age that your client could have used an iPhone for a period of years and not have written the password down somewhere, even if he can't remember it. Nobody does --

MR. STEGER: Your Honor, I don't know how plausible that is. I don't have my password written down anywhere. But I --

THE COURT: That's probably because you know it.

MR. STEGER: That is, your Honor. But I have -- I

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PROCEEDINGS

45

asked Mr. Palmieri the interrogatory; he's reviewed the interrogatory, and he's submitted a verified response.

THE COURT: Was it a touchscreen iPhone; did it open with his fingerprint or his thumbprint? Shall we require him to come in and supply that?

MR. STEGER: I don't know, your Honor. I have not seen the phone.

THE COURT: All right, so I am going to direct you to serve a further supplemental response to interrogatory number three, as well. And in your further supplemental response to interrogatory number three you are to reflect two things; first, your client is to make a good-faith effort to recall and/or turn up his passcode, should he have recorded it somewhere, as most people do. He is required to do that research, if research is required, look for the scrap of paper at the bottom of his knapsack, look for the list he made on his other computer of his secret passcodes, whatever it is that he did, look for his keychain if he used one of the keychain programs available on the internet for keeping people's passcodes. In other words, he is required to do some reasonable digging to dig up that passcode. And if he is still unable to do so, he is required to disclose in his supplemental interrogatory response whether he had any other means of unlocking the

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PROCEEDINGS

46

phone, for example, whether it unlocked for him in response to a fingerprint, a thumbprint or a facial recognition program, which I know they have on the modern iPhones. All right? So how much time do you need to serve your supplemental interrogatory responses to one and three?

MR. STEGER: By the end of next week, your Honor.

THE COURT: All right, so that would be by November the 13th. So that is what we will do.

All right, I think we are done for today with Palmieri against East Coast Power & Gas. Last chance. Go ahead.

MR. STEGER: Just one more procedural question, your Honor. Is there -- for the joint report, is there a page limit on that?

THE COURT: Oh, thank you for asking. I would very much like there to be a page limit on that because sometimes when I simply tell people to be succinct, they think "succinct" means something different --

MR. GOMBERG: The opposite, right. Right, your Honor.

THE COURT: All right. I'm going to give you a total of six pages for the whole shooting match. If you have so much to say that that's not enough pages, then you're going to need to send me a letter application

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PROCEEDINGS

47

seeking permission to write longer. And I'm not going to look with favor on that. Because I will give you a chance to flesh it out when we get on the phone.

All right?

MR. GOMBERG: Thank you, your Honor -- yes. Thank you, your Honor.

THE COURT: All right, we will be adjourned.

MR. STEGER: Thank you, your Honor, for your time.

MR. GOMBERG: Thank you, your Honor.

(Whereupon, the matter is adjourned.)

C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the case of Palmieri v. East Coast Power & Gas, LLC et al, Docket #20-cv-02663-RA-BCM, was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature_____

Carole Ludwig

Date: November 18, 2020